Supreme Court, U.S.
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Nos. 01-653 and 01-657

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ARCTIC SLOPE REGIONAL CORPORATION, ET AL., PETITIONERS

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL RESPONSE BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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2 pp

TABLE OF CONTENTS

	Page
Supplemental response brief for the Federal Communications Commission	1
Appendix	1a

TABLE OF AUTHORITIES

Case:

U.S. Airwaves, Inc. v. *FCC*, 232 F.3d 227 (D.C. Cir. 2000) 3, 5

Statute and rule:

Communications Act of 1934, 47 U.S.C. 309 (1994 & Supp. V 1999) 7

Sup. Ct. R. 25.5 2

Miscellaneous:

FCC Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to Nextwave Personal Communications Inc., Next-Wave Power Partners, Inc. and Urban Comm-North Carolina, Inc.*, FCC No. 02-248 (rel. Sept. 12, 2002) 1, 2, 4, 6

Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, In re:

12 FCC Rcd 16,436 (1997) 3, 6

13 FCC Rcd 8345 (1998) 3, 6

Requests for Refunds of Down Payments Made In Auction No. 35, In re, 17 FCC Rcd 6283 (2002) 2

SUPPLEMENTAL RESPONSE BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

On September 12, 2002, the Federal Communications Commission (Commission or FCC) issued a Public Notice seeking comment on the disposition of down payments and license applications submitted by winning bidders in Auction 35 for the licenses previously issued to respondents NextWave Personal Communications Inc. and NextWave Power Partners Inc. FCC Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm-North Carolina, Inc.*, FCC No. 02-248 (rel. Sept. 12, 2002) (Public Notice). The FCC filed a copy of that Notice with this Court on September 13, 2002.[1] In the Public Notice, the Commission explained that, although Auction 35 took place more than 20 months ago (on January 26, 2001), the ongoing litigation in this case has prevented it from delivering the licenses to the winning bidders. Public Notice at 1-2, 5 (App., *infra*, 1a-2a, 8a). Accordingly, the Commission requested comments on whether it should return the down payments made by the winning bidders in Auction 35, and whether it should permit those bidders to withdraw their successful bids and license applications with a reduced penalty or without penalty. *Id.* at 4-5 (App., *infra*, 6a-8a).

Although the Commission's Public Notice does not appear to be sufficiently germane to warrant the filing of supplemental briefs, respondents filed such a brief on September 20, 2002. In that brief, they argue that the Public Notice "contradict[s] the FCC's central themes in this case" and confirms that the Commission's concern for auction integrity

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[1] For the convenience of the Court, we also reproduce a copy of the Public Notice as an Appendix to this brief.

is "empty." Resp. Supp. Br. 2. Pursuant to this Court's Rule 25.5, the Commission submits this brief to address those arguments, which lack merit.

1. Respondents first contend that the Commission "reversed itself" in the Public Notice by abandoning its earlier emphasis on the importance of "auction integrity." Resp. Supp. Br. 1. That argument is misconceived. The Public Notice does not take any action at all, much less abandon the Commission's former position. It merely solicits public comments "on whether [the Commission] should *consider further*" the possibility of permitting the winning bidders in Auction 35 to withdraw their winning bids, renounce their claims to the licenses, be released from further payment obligations, and/or reclaim their down payments with a reduced penalty or no penalty. Public Notice at 4 (emphasis added) (App., *infra*, 6a).

Furthermore, far from disavowing the Commission's interest in preserving auction integrity, the Public Notice expressly reaffirms it. The Notice states that "the Commission remains concerned about protecting the integrity of its spectrum auction program" and warns that "[c]oncerns about the state of the capital markets" and the effects of litigation-created delays "must be balanced against this important public interest consideration." Public Notice at 3 (App., *infra*, 5a); see also 17 FCC Rcd 6283, 6290-6291 (¶ 12) (2002) (FCC "must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation" and "strike a balance between the hardship that would be imposed by our continuing to retain the entirety of the down payments and our need to protect the integrity of the auction."). To the extent respondents believe that any of the possible actions put out for comment in the Public Notice would have an adverse effect on auction integrity and the public interest, their concerns are properly addressed to the Commission in response to its request for comments before it takes any final agency action.

2. Respondents also suggest that the Commission's request for comments is inconsistent with its refusal to permit respondents to keep their licenses after breaching the payment conditions of those licenses, claiming that the Commission previously failed to show such sensitivity to the status of the capital markets and its effect on licensees. See Resp. Supp. Br. 2. But precisely the opposite is true. The Commission offered analogous relief to respondents and other C-Block licensees when they encountered difficulty obtaining financing in the capital markets to meet their payment obligations. See 12 FCC Rcd 16,436, 16,442 (¶ 11) (1997). Indeed, because the Commission found that it would serve the public interest, it suspended payment obligations for respondents and other C-Block licensees for more than a year even as they held the licenses, preventing the licenses from automatically canceling on nonpayment of sums that otherwise would have been due. See 13 FCC Rcd 8345, 8354 (¶ 24) (1998). And, again because the FCC determined that it would further the public interest, the FCC offered respondents and the other C-Block licensees a range of relief options at the end of that year, including an "amnesty" option under which C-Block licensees could return licenses in exchange for relief from outstanding payment obligations. See 13 FCC Rcd at 8350, 8354 (¶¶ 11-15, 24); 12 FCC Rcd at 16,439, 16,459-16,464 (¶¶ 6, 46-58).[2] Respondents, of course,

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[2] The Commission offered respondents and other C-Block licensees four options. See generally 12 FCC Rcd at 16,439-16,440 (¶ 6); *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 231 (D.C. Cir. 2000). First, licensees could simply resume payment under the existing rules. 12 FCC Rcd at 16,439 (¶ 6). Second, under the amnesty option, licensees could surrender their licenses for re-auction in exchange for amnesty from further payment obligations. 13 FCC Rcd at 8357-8360 (¶¶ 31-37). Third, licensees could return some of their licenses in exchange for release from payment conditions on those licenses and the right to apply 70% of their downpayments on the returned licenses to payment for licenses they chose to retain. *Id.* at 8360-8366 (¶¶ 38-48). Fourth, and in addition, the licensees could disaggregate 30 MHz licenses, return 15 MHz, and be relieved of

chose not to avail themselves of those opportunities. Having been offered and having rejected analogous administrative relief designed to alleviate the financial consequences of market downturns and other factors—including options that would have allowed them to return their licenses to the FCC for re-auction in exchange for eliminating the payment obligations they could not meet—respondents have no basis for objecting to the Commission's request for comments on whether it should offer similar relief to Auction 35 winning bidders.

Respondents, moreover, ignore the fundamental difference between themselves and the Auction 35 winning bidders—the fact that the winning bidders in Auction 35 never received their licenses. Although Auction 35 closed more than 20 months ago, continuing and unresolved litigation has prevented the Commission from delivering the licenses to Auction 35's winning bidders. Public Notice at 5 (App., *infra*, 8a). In light of the past and potential future delays,[3] as well as pending litigation between the Commission and certain Auction 35 bidders that could further delay utilization of the spectrum if or when licenses are delivered (Public Notice at 2-3, 5 (App., *infra*, 3a-5a, 6a)), it is not unreasonable for the Commission to consider whether it would be in the public interest to relieve the Auction 35 bidders from their current obligations.

The difference between the winning bidders in Auction 35 and respondents necessarily means that the considerations before the Commission will not be identical. In contrast to the Auction 35 winning bidders, respondents failed to make the payments on which their licenses were conditioned *after*

half the payment responsibility associated with the disaggregated licenses. *Id.* at 8366-8371 (¶¶ 49-60).

[3] Even if this Court resolves the pending litigation in the government's favor, the Commission explained, "there may nevertheless be unresolved issues over the licenses, that would prolong the litigation." Public Notice at 5 (App., *infra*, 8a).

receiving the licenses. As a result, in respondents' case, the FCC could evaluate whether to enforce the terms of the licenses, or whether factors (such as those that led the Commission to suspend the payment obligations of all C-Block licensees for more than a year, and whether a carrier was already providing service under the license) tipped the public interest analysis in favor of relaxing the payment obligation or waiving a breach. The same analysis does not apply to the winning bidders in Auction 35 because they obviously have not violated the terms of, or provided service under, licenses they have not yet received.

3. Ultimately, the Public Notice confirms precisely what respondents have refused to acknowledge throughout this litigation—that the Commission's conduct of the auction program, and its consideration of relief from payment conditions and automatic cancellation rules, are informed by its judgment and expertise in furtherance of its statutory obligation to allocate licenses in the public interest. Thus, in the case before this Court, the Commission sought comment on various forms of relief for respondents and other C-Block licensees. It determined that the *public interest* favored waiving the Commission's rules to suspend respondents' and other C-Block licensees' payment obligations for more than a year. And it determined that the public interest supported suspending the Commission's rules to allow them to retain their licenses under various restructuring options, or to return their licenses under an amnesty option, *U.S. Airwaves, Inc.* v. *FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (FCC "determined that the statutory goals * * * required it to liberalize the financial terms available to C-Block licensees"), even though returned licenses were re-auctioned at a loss, Gov't Reply Br. 18.[4] The FCC also considered, but rejected

[4] By re-auctioning the licenses—even at a loss—the Commission accomplished the statutory goal of placing the licenses in the hands of those prepared to place the spectrum into rapid and intensive use by offering service to public benefit. By attempting to circumvent the

as contrary to the public interest, proposals to extend the suspension of payments beyond the more-than-one-year suspension period. 12 FCC Rcd at 16,446-16,447 (¶ 18); 13 FCC Rcd at 8348, 8354 (¶¶ 7, 24). Likewise, the FCC considered, but rejected as contrary to the public interest, permitting respondents to retain their licenses after they rejected the restructuring options and breached the licenses' payment condition, because such relief would undermine auction integrity and because respondents were "providing no service," were "not in commercial operation," and had left valuable spectrum "unused" for more than three-and-a-half years. Pet. App. 71a, 78a, 82a.

In the Public Notice that is the subject of respondents' supplemental brief, the Commission similarly has asked for comment on whether the public interest might support suspending its rules to allow bidders who have not yet received their licenses, and might not receive them for some time, to withdraw their bids with a reduced penalty or no penalty. It specifically sought comment on whether the identified alternatives would "promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including 'promoting economic opportunity and competition' and ensuring 'efficient and intensive use of the electromagnetic spectrum.' 47 U.S.C. § 309(j)(3)(B) & (D)." Public Notice at 5 & n.15 (App., *infra*, 8a & n.15).[5]

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options provided by the FCC, respondents have caused the spectrum to remain unutilized to this day.

[5] As respondents point out (Resp. Br. 14-15), current economic conditions make it possible if not likely that any re-auction at this point would generate less than the $15 billion bid in Auction 35. The Commission's willingness to consider permitting the Auction 35 bidders to withdraw their bids with a reduced penalty or no penalty—despite the fact that such withdrawal would harm the government's financial interests—further contradicts the claim of respondents' amici (*e.g.*, Urban Comm-North Carolina, Inc., *et al.*) that the Commission is pursuing financial rather than regulatory goals.

Critically, in each situation, the licensing policy decision—not merely the establishment of the rules but also the consideration of potential discretionary relief—is one that Congress has delegated to the Commission under the public interest standard of the Communications Act, 47 U.S.C. 309. In each situation, the Commission retains discretion to provide relief from its rules, whether those rules impose regulatory obligations or provide for license cancellation, if the public interest so requires. In gauging the public interest, the Commision must weigh a number of factors, including auction integrity and the efficient, rapid, and intensive use of spectrum in the public interest that auctions are designed to promote. Nothing in the Bankruptcy Code or respondents' supplemental brief suggests that Congress intended the Bankruptcy Code to displace the Commission's exercise of its expertise and judgment in such matters.

* * * * *

For the foregoing reasons and those stated in our briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General[*]

SEPTEMBER 2002

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[*] The Solicitor General is disqualified in this case.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 TWELFTH STREET, S.W.
WASHINGTON, D.C. 20554 FCC 02-248

News Media information 202/418-0500 Fax-On-Demand 202/418-2830 Internet: http://www.fcc.gov ftp.fcc.gov

Released: September 12, 2002

COMMISSION SEEKS COMMENT ON DISPOSITION OF DOWN PAYMENTS AND PENDING APPLICATIONS FOR LICENSES WON DURING AUCTION NO. 35 FOR SPECTRUM FORMERLY LICENSED TO NEXTWAVE PERSONAL COMMUNICATIONS INC., NEXTWAVE POWER PARTNERS, INC. AND URBAN COMM-NORTH CAROLINA, INC.

WT Docket No. 02-276

Auction Event No. 35

Comment Date: October 11, 2002
Reply Comment Date: October 21, 2002

BACKGROUND

On March 26, 2002, the Commission granted partial refunds of the down payments made by certain winning bidders in Auction No. 35.[1] These winning bidders had made down payments and filed long-form applications for spec-

[1] Requests for Refunds of Down Payments Made In Auction No. 35, *Order*, FCC 02-99 (rel. Mar. 27, 2002) ("*Partial Refund Order*").

trum associated with licenses that had previously been issued to NextWave Personal Communications Inc., NextWave Power Partners Inc. (collectively "NextWave") and Urban Comm-North Carolina, Inc. ("Urban Comm"). This spectrum, as well as Auction No. 35, continues to be the subject of extensive litigation and pending regulatory proceedings.[2] Key issues over the effectiveness of the Commission's automatic [2] cancellation rules with respect to NextWave's licenses are scheduled for oral argument before the Supreme Court on October 8, 2002.[3]

Pursuant to the *Partial Refund Order*, the Commission has already refunded approximately $2.8 billion to the Auction No. 35 winning bidders who have not yet received their licenses, but it retained an amount equal to three percent of the net winning bids for these licenses and maintained the pending status of the applications for these licenses. The

[2] *NextWave Personal Communications Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted*, __ U.S. __ , 70 U.S. L.W. 3317, 70 U.S.LW. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999); *Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002); *In re Urban Comm-North Carolina, Inc.*, Case No. 98-B-10086 (REG), Adv. Proc. No. 99/8125A; Applications for Review, dated March 17, 1997 and June 16, 1997, filed by Antigone Communications, L.P. and PCS Devco, Inc.; Petition to Initiate an Investigation and Audit Regarding the Eligibility of NextWave Personal Communications, Inc. and NextWave Power Partners Inc. to Hold C and F Block licenses, filed by Alaska Native Wireless, L.L.C., Verizon Wireless, and VoiceStream Wireless Corporation, dated July 19, 2001; Petition for Reconsideration, filed by Alaska Native Wireless, L.L.C. and VoiceStream Wireless Corporation, dated October 12, 2001; Petition to Deny Reinstatement of Licenses, filed by Alaska Native Wireless, L.L.C., and VoiceStream Wireless Corporation, dated August 30, 2001.

[3] *See FCC v. NextWave Personal Communications Inc., cert. granted*, __ U.S. __, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3551 (U.S. March 4, 2002) (Nos. 01-653, 01-657).

total amount still on deposit with the Commission is $489,548,061. The total amount of these Auction No. 35 winners' obligations, including the refunded down payments, to the government for the former NextWave and Urban Comm licenses won at the auction is $16,318,268,700. The Commission has already received $504,419,150 in final payments for other licenses won and granted based on Auction No. 35.

As noted in the *Partial Refund Order*, the Commission was sympathetic to the needs of the auction winners, many of whom are small businesses, to have access to their funds to continue to operate their businesses. At the same time, the Commission held that it must protect the integrity of Auction No. 35 in the event the Commission is ultimately successful in its litigation. It therefore struck a balance between the hardship that would be imposed by continuing to retain the entirety of the down payments and the need to protect the integrity of the auction. Accordingly, it refunded to the payors of record a substantial portion of the monies on deposit.

However, the Commission's *Partial Refund Order* also found, *inter alia*, that the continued litigation associated with particular licenses *did not* relieve the winning bidders of the obligation to pay their full bid amounts for licenses won in Auction No. 35. In this regard, the Commission disposed of matters raised by Verizon in a letter to the Commission's Deputy General Counsel in which Verizon argued that it no longer had an obligation to pay the amount it bid in Auction No. 35 based on the theory that spectrum auctions create contractual relationships between the Commission and winning bidders, and that the Commission's failure to make timely delivery of the licenses rendered the contract void.[4] No other Auction No. 35 applicant advanced this con-

[4] *Partial Refund Order* at 9-10, para. 14-16.

tract theory. In response to Verizon's letter, the *Partial Refund Order* stated that auctions are a regulatory mechanism for distributing licenses and that the relationship between the Commission and winning bidders of spectrum licenses is governed by the Communications Act, the Commission's competitive bidding regulations, and Public Notices setting forth specific conditions on particular auctions. Those conditions, the Commission stated, included the auction's contingency on the "final"outcome of the *NextWave* litigation.[5] [3] Therefore, the Commission held that the fact that spectrum associated with the former NextWave licenses was not yet available for use by the Auction No. 35 winning bidders did not require the Commission to relieve Verizon of its bid obligations.[6]

Verizon challenged the Commission's *Partial Refund Order* in two courts.[7] In the D.C. Circuit, in case No. 02-1110, Verizon seeks a ruling that the delay in licensing caused by the NextWave litigation entitles Verizon to declare its auction obligations void. In the Court of Federal Claims, in case No. 02-280c, Verizon seeks a declaration nullifying Auction No. 35 as well as consequential damages. We stand by our legal conclusions in the *Partial Refund Order*, and do not

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[5] *Id.* at 9, para. 15.

[6] *Id.* at 9, para. 16.

[7] *See Cellco Partnership d/b/a Verizon Wireless v. FCC*, D.C. Cir. No. 02-1110 (filed April 8, 2002); *Cellco Partnership d/b/a Verizon Wireless v. United States*, C.F.C. No. 02-280c (filed April 5, 2002). The case pending in the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is at the briefing stage—Verizon Wireless's opening brief is due November 22, 2002, followed by the FCC's brief on January 8, 2003, and Verizon's reply on February 6, 2003. Oral argument is scheduled for April 15, 2003. In the case pending before the Court of Federal Claims, the government has requested that this case be held in abeyance pending disposition by the D.C. Circuit of the related case and the Supreme Court of the NextWave case.

through this Public Notice suggest any support for Verizon's legal argument.

DISCUSSION

Since the Commission issued its *Partial Refund Order* several months ago, the state of the capital markets for entities, including the applicants, engaged in the provision of wireless telecommunications services, as well as other telecommunications services, has continued to decline rapidly. Specifically, since March, the Commission has received submissions asserting that unique and troubling financial circumstances have led to difficulties in accessing capital and other problems for companies of all sizes, which in turn has affected the customers they serve.[8] For instance, these commenters suggest that the impact of continuing contingent liabilities on credit ratings in the midst of a severe downturn in capital markets could potentially frustrate other policy objectives as well as quality of service. Moreover, as we have seen in the past,[9] market downturns affect the value of spectrum licenses won at auction and licensees' (or applicants') ability to meet auction payment obligations. At the same time, the Commission remains concerned about protecting the integrity of its spectrum auction program.[10] Concerns about the state of the capital markets must be balanced against this important public interest consideration.

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[8] *See* Letter to Michael K. Powell, Chairman, FCC, from Peter C. Crampton, *et al.*, at p.2 (Aug. 16, 2002); *see also* Letter to Michael K. Powell, Chairman, FCC, from Thomas E. Wheeler, Cellular Telecommunications & Internet Assoc., at p. 2 (Aug. 13, 2002).

[9] *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436 (1997) (*C Block Restructuring 2nd R & O*), *on recon.* 13 FCC Rcd 8345 (1998) (*Recon. of C Block Restructuring 2nd R & O*), *aff'd*, *U.S. Airwaves Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

[10] *C Block Restructuring 2nd R & O* , 12 FCC Rcd 16,436, para. 2-3 (1997).

[4] Taking official notice of the status of the capital markets and other economic events, the Commission, on its own motion, seeks comment on the observations in the paragraph above and whether it should take further action with regard to the pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave and Urban Comm.

Specifically, we seek comment on whether we should consider further, *inter alia*, the following scenarios:

> **(1) Full Refund and Option to Dismiss All Pending Applications.** Upon request, the Commission would refund to the payor of record the full amount of monies on deposit with the Commission for the licenses subject to the NextWave litigation and Urban Comm proceedings. The Commission would also provide a period of time for individual applicants to request voluntary dismissal of all of their applications, with prejudice.
>
> Under this scenario, applicants obtaining a full refund and choosing to dismiss their applications would lose all claims to the affected Auction No. 35 licenses.[11] Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would waive, in whole or part, its default rules for these licenses and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards,[12] forgive the debt incurred on them at Auction

[11] In addition to relinquishing any and all claims on the Auction No. 35 licenses, the bidder would also be required to release any other claims against the United States and the FCC arising out of Auction 35.

[12] *See* 4 C.F.R. Parts 101-105; *C Block Restructuring 2nd R & O*, 12 FCC Rcd 16436, para. 53-58 (1997); *U.S. Department of Justice Approves Debt Forgiveness for Personal Communications Services (PCS) C Block*, DA 98-1051, Public Notice (June 3, 1998).

No. 35. We seek comment on whether it would be advisable to waive the default rules, or to extend debt forgiveness, in whole or in part, to a bidder opting for dismissal of its application(s). In addition, we seek comment on whether a bidder receiving a waiver or debt forgiveness should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.[13] Finally, we seek comment on whether applicants that would like to keep their applications pending should reaffirm their commitment to their Auction No. 35 obligations or just remain silent.

> **(2) Selective Opt-Out for Pending Applications.** The Commission would grant individual applicant requests for voluntary dismissal of their applications, with prejudice, for certain licenses and not others.
>
> [5] Under this scenario, the Commission would provide applicants the opportunity to pick and choose licenses for which to keep the applications pending and which to dismiss.[14] We seek comment on whether all of the down payments should be refunded or only down payments associated with the dismissed licenses. As with the above scenario, applicants choosing to dismiss their applications would lose all claims to the affected licenses. Should the Commission prevail in the litigation, new initial licenses for the spectrum would be assigned by auction at a future date. In addition, the Commission would, in whole or part, waive its default rules for

[13] We note that in the C-block debt restructuring proceeding, licensees that surrendered licenses pursuant to the various options, under certain circumstances, were deemed ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next reauction. *Recon. of C Block Restructuring 2nd R & O*, 13 FCC Rcd 8345, para. 37 (1998).

[14] *Id.* at para. 34-37.

dismissed license applications and, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards, forgive the debt on them incurred at Auction No. 35. Again, we seek comment on whether a bidder opting for dismissal of its application(s) and receiving a full or partial waiver of the default payment rules should be barred from participating in the reauction of the licenses or otherwise obtaining such licenses for a period of time.

Although the oral argument in the Supreme Court case is fast approaching and the Commission has the utmost confidence in the merits of its case, the Commission and winning bidders in Auction No. 35 still face the possibility of prolonged litigation over such licenses during uncertain and trying economic conditions. We also recognize that should the Supreme Court rule in the government's favor, there may nevertheless be unresolved issues over the licenses, that would prolong the litigation. Depending on the length of the delay, capital market conditions may continue to change, increasing the possibility that winning bidders in Auction 35 will be in a significantly different position tha[n] at the time of the auction. Accordingly, we seek comment on the scenarios discussed above based on the changed circumstances since issuance of our *Partial Refund Order*. We also seek comment on whether granting relief under any of the options discussed herein would promote or disserve the public interest objectives outlined in Section 309(j) of the Communications Act, including "promoting economic opportunity and competition" and ensuring "efficient and intensive use of the electromagnetic spectrum."[15]

[15] 47 U.S.C. § 309(j)(3)(B) & (D).

PROCEDURAL MATTERS

Pursuant to 47 C.F.R. § 1.1200(a), the Commission may adopt modified *ex parte* procedures in particular proceedings if the public interest so requires. Accordingly, issues related to this Public Notice will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206.[16] Designating this matter as "permit but disclose" will provide an opportunity for all interested parties to comment on the policy questions concerning the treatment of the funds on deposit. All other matters concerning Auction No. 35 applications that are the subject of NextWave's Petition to Defer[17] and other [6] petitions to deny remain restricted, pending further action by Public Notice.

Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before September 30, 2002, and reply comments on or before October 15, 2002. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal

[16] Parties making oral ex parte presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subject discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2).

[17] NextWave's Petition to Defer or, in the Alternative, to Condition Grant (filed March 9, 2001); Reply Comments of Verizon Wireless (filed March 16, 2001).

screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Marlene H. Dortch, Secretary, Office of the Secretary, Federal Communications Commission.

Action by the Commission on September 11, 2002: Chairman Powell, Commissioners Abernathy and Martin with Commissioner Copps concurring and issuing a statement.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

RE: Commission seeks comment on disposition of down payments and pending applications for licenses won during Auction No. 35 for spectrum formerly licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc. and Urban Comm—North Carolina, Inc. (Auction Event No. 35)

I believe that there are strong equitable arguments to support returning the remaining funds on deposit related to Auction 35, and even for dismissing all pending applications related to that auction. But I am frankly somewhat concerned about the timing of today's Public Notice, as drafted. I have been in this town long enough to know that there is something called the Law of Unintended Consequences, and I never underestimate its power. I must, therefore, concur rather than approve of this action.